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 14 KEATING DENTAL ARTS, INC.

15 IN THE UNITED STATES DISTRICT COURT  
 16 FOR THE CENTRAL DISTRICT OF CALIFORNIA  
 17 SOUTHERN DISTRICT

18 JAMES R. GLIDEWELL DENTAL  
 19 CERAMICS, INC. dba GLIDEWELL  
 LABORATORIES,

20 Plaintiff,

21 v.

22 KEATING DENTAL ARTS, INC.

23 Defendant.

24 AND RELATED COUNTERCLAIMS.

) Civil Action No.  
 ) SACV11-01309-DOC(ANx)

) Honorable David O. Carter

) **DEFENDANT AND COUNTER-**  
 ) **PLAINTIFF KEATING**  
 ) **DENTAL ARTS, INC.'S**  
 ) **OMNIBUS OPPOSITION AND**  
 ) **RESPONSE TO PLAINTIFF**  
 ) **AND COUNTER-DEFENDANT**  
 ) **JAMES R. GLIDEWELL**  
 ) **DENTAL CERMANICS, INC.'S**  
 ) **MOTION IN LIMINE NOS. 5-9**

) Trial Date: February 26, 2013

) Time: 8:30 a.m.

) Location: Courtroom 9D

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1 In light of the highly abbreviated time period for Defendant and Counter-  
 2 Plaintiff Keating Dental Arts, Inc. (“Keating”) to oppose the nine motions *in*  
 3 *limine* filed late last night by Defendant James R. Glidewell Dental Ceramics,  
 4 Inc. (“Glidewell”), Keating hereby files this consolidated Omnibus Opposition  
 5 and Response to Glidewell’s Motions *In Limine* Nos. 5–9.<sup>1</sup>

6 **I. GLIDEWELL’S MOTION *IN LIMINE* NO. 5 SHOULD BE DENIED**  
 7 **BECAUSE EVIDENCE RELATING TO CERTAIN TRADEMARK**  
 8 **OFFICE PROCEEDINGS IS BOTH RELEVANT AND HIGHLY**  
 9 **PROBATIVE**

10 Glidewell argues that any evidence relating to Keating’s filings and the  
 11 U.S. Patent and Trademark Office’s (PTO) actions in Proceeding No. 92056050  
 12 and Proceeding No. 91202891 (collectively, “PTO Proceedings”) is both  
 13 irrelevant and prejudicial. Specifically, Glidewell argues that the PTO  
 14 Proceedings “say nothing about the validity of the BruxZir mark or the merits of  
 15 Keating’s purported defenses,” and that the “jury may wrongly conclude that its  
 16 decision will be second guessed.” (Glidewell’s MIL No. 5 at 1:18-23.) These  
 17 arguments are without merit.

18 **A. Evidence of the PTO’s Pending Actions are Relevant**

19 Glidewell hypothesizes that Keating will introduce items from the PTO  
 20 Proceedings as evidence, and argument that the PTO is second-guessing the  
 21 grant of Glidewell’s BruxZir mark and may cancel or deny it registration. (*Id.*  
 22 at 3:26-28.) Glidewell cites case law stating that PTO decisions and pending  
 23 proceedings are of limited or no relevance to trademark infringement actions.  
 24 (*Id.* at 3:6-8.) By Glidewell’s own logic, any mention of a decision from the  
 25 PTO, including the decision to *grant* a trademark at all, is irrelevant to a  
 26 ///

27  
 28 <sup>1</sup> Keating presents its opposition and response to Glidewell’s Motion *In Limine* Nos.  
 1–4 in a separate document filed concurrently herewith.

1 trademark infringement action. Glidewell's tautology would preclude Glidewell  
2 from informing the jury of the existence of its BruxZir trademark.

3 Glidewell fails to recognize the reason the PTO Proceedings are relevant  
4 to this case. Glidewell has introduced evidence, and made arguments, relating  
5 to its use of the BruxZir name on products other than dental restorations, most  
6 notably its zirconia milling blanks. By way of example, in its motions for  
7 summary judgment Glidewell included as purported evidence of commercial  
8 strength of the mark BruxZir the advertising monies spent by Glidewell on  
9 advertising the BruxZir name when used with its zirconia milling blanks. It is  
10 important that the jury understand that (1) Glidewell's registered mark is only  
11 registered for use on a limited scope of goods and services (i.e., dental  
12 restorations); and (2) while Glidewell has used the BruxZir name as a trademark  
13 for other goods and services (e.g., zirconia milling blanks), it does not have a  
14 registration for such use, and Keating is not being accused of infringing the  
15 BruxZir name for these other uses.

16 Keating anticipates from Glidewell's contributions to the Joint Exhibit  
17 List and from its conduct in this case that Glidewell will introduce evidence and  
18 argument informing the jury that Glidewell has filed an application to register  
19 BruxZir as a trademark for use with its zirconia milling blanks. Accordingly, it  
20 is further relevant for the jury to receive evidence and argument relating to the  
21 fact that (1) Glidewell's application to use the name BruxZir in connection with  
22 its milling blanks has not resulted in a registration, (2) the application is  
23 suspended pending the outcome of this lawsuit, and (3) Keating has filed an  
24 opposition with the PTO to that application. This evidence is relevant to  
25 establish that a pending application is not support for a previously granted one,  
26 and that Keating has not been negligent, acquiescing, or otherwise standing by  
27 while Glidewell pursues protection for the BruxZir name.

28 ///

1           Keating anticipates that Glidewell may also introduce evidence and make  
 2 arguments at trial that the PTO publishes pending trademark applications to  
 3 afford the public the opportunity to oppose the pending trademarks prior to  
 4 registration. Keating believes Glidewell may argue to the jury that, because  
 5 Keating did not oppose Glidewell's application to register BruxZir for its dental  
 6 restorations, Keating was either negligent or acquiesced to Glidewell's  
 7 application. Accordingly, Keating would need to introduce the PTO  
 8 Proceedings evidence to rebut any suggestion of negligence or acquiescence on  
 9 the part of Keating made by Glidewell—not as evidence of the Proceedings'  
 10 value or merit.

11       **B. The Probative Value of the PTO Proceedings is Not Outweighed By**  
 12       **the Danger of Unfair Prejudice and Jury Confusion**

13           Glidewell argues that introduction of the PTO Proceedings would cause  
 14 unfair prejudice in the context of F.R.E. 403, because it would cause the jury to  
 15 have improper grounds for unsupported inferences. (Glidewell's MIL No. 5 at  
 16 6:14-16.) Additionally, Glidewell argues that evidence of the PTO Proceedings  
 17 is likely to confuse the jury and encourage a decision on an improper basis."  
 18 (*Id.* at 6:26-27.) Despite these arguments, *without providing legal basis*,  
 19 Glidewell argues that the decision of the PTO to allow the registration of the  
 20 BruxZir mark is presumed to be correct—and presumably should be allowed.  
 21 (*Id.* at 7:17-22.)

22           Respectfully, Glidewell cannot have it both ways. Keating fails to  
 23 understand how Glidewell can claim that PTO Proceedings will provide an  
 24 improper basis for unsupported inferences and confuse the jury, but claim that  
 25 the PTO's positive factors for Glidewell will not provide an improper basis for  
 26 unsupported inferences and confusion. The reasoning is contradictory and  
 27 underscores the hollow nature of Glidewell's argument. Furthermore, as  
 28 discussed in section V.A., *supra*, the PTO Proceedings will not confuse the jury

1 as to Keating's lack of negligence regarding opposition to the BruxZir mark,  
2 and refusal to acquiesce to the might of Glidewell.

3 Glidewell goes on to argue the PTO Proceedings will prejudice the jury.  
4 (*Id.* at 8:5-8.) Once again, Glidewell argues that it is appropriate for it to parade  
5 its favorable PTO dealings, which could be prejudicial to Keating, while at the  
6 same time arguing that PTO Proceedings are entirely prejudicial. (*Id.* at 8:12-  
7 16.) Glidewell's reasoning suggests that it is permissible for Glidewell to  
8 proffer evidence that by its own arguments is "prejudicial," but not for Keating  
9 to rebut this evidence. What is more, the evidence is not prejudicial because  
10 Keating is not seeking to introduce the language, but evidence of Keating's  
11 action and resistance against the Glidewell trademark and Glidewell's  
12 application in connection with the milling blanks. The PTO Proceedings are not  
13 prejudicial in so far as they are rebuttal evidence to Glidewell's own PTO  
14 evidence.

15 Finally, Glidewell hypothesizes as follows:

16 Keating's sole purposes in admitting evidence of the PTO  
17 Proceedings would be to convey to the jury that the validity of the  
18 BruxZir mark is somehow undermined or weakened merely  
19 because Keating has sought its cancellation in the PTO. There is a  
20 substantial risk that the jury would be confused as to the legal  
21 import, if any, of Keating's PTO filings, and will draw unwarranted  
22 inferences about the significance of these filings. In addition, or  
alternatively, the jury would be invited to conclude that it need not  
take its job seriously, because PTO will ultimately set things right  
or overrule the jury's decisions.

23 (*Id.* at 8:17-24.) As discussed above, this does not accurately present why  
24 Keating may admit evidence of the PTO Proceedings. Additionally, the  
25 evidence would also rebut any suggestion by Glidewell that because it has  
26 another trademark pending for its milling blanks, there is somehow a  
27 presumption that its previous trademark is proper. These purposes are unlikely  
28 to either confuse or prejudice the jury. Glidewell's argument that the jury may



1 not “take its job seriously” should the PTO Proceedings be introduced is an  
 2 unwarranted fear that could nonetheless be addressed and mitigated by the jury  
 3 instructions. As such, the PTO Proceedings are unlikely to confuse or prejudice  
 4 the jury in violation of Rule 403.

5 **C. The PTO Proceedings are Not Hearsay**

6 Glidewell correctly states the definition of hearsay. Hearsay is evidence  
 7 introduced to prove the fact of the matter asserted. Fed. R. Evid. 801. Here,  
 8 Glidewell ignores that the PTO Proceedings are not to be introduced for their  
 9 truth. As discussed above, the PTO Proceedings would be offered to establish  
 10 the scope of Glidewell’s trademark rights (which goods and services are covered  
 11 by Glidewell’s registration (i.e., dental restorations) and which goods and  
 12 services are not (e.g., zirconia milling blanks)) and that Keating has not been  
 13 negligent or acquiescing to Glidewell’s pursuit of trademark rights in the  
 14 BruxZir name. Additionally, the PTO Proceedings may be introduced to help  
 15 establish that a pending trademark is not evidence of the validity of a registered  
 16 trademark. Because the PTO Proceedings would not be introduced for their  
 17 truth of the matter asserted (i.e., the specific statements within the Proceedings),  
 18 the above uses do not qualify as hearsay. Glidewell’s Motion *In Limine* No. 5  
 19 should be denied.

20 **II. GLIDEWELL’S MOTION *IN LIMINE* NO. 6 SHOULD BE DENIED**  
 21 **BECAUSE EVIDENCE OF THE ADVICE OF COUNSEL DEFENSE**  
 22 **WAS INTRODUCED DURING DISCOVERY**

23 Glidewell argues that Keating’s advice of counsel defense and the related  
 24 evidence should be excluded. (See Glidewell’s MIL No. 6.) Glidewell argues  
 25 that Keating failed to disclose any such advice and that this advice could cause  
 26 jury speculation. Essentially, Glidewell’s argument boils down to its assertion  
 27 that Keating did not provide the specific advice of its counsel during the  
 28 discovery phase and should be precluded, under Rule 37(c), from introducing



1 and relying on such advice of counsel at trial to show (1) Keating's intent (one  
 2 of the *Sleekcraft* factors in assessing likelihood of confusion) and (2) that  
 3 Keating did not willfully infringe (going to the issue and element of damages).  
 4 These arguments fail as early in discovery Keating informed Glidewell that  
 5 counsel was involved in Keating's selection of the name, and both Bob Brandon  
 6 and Shaun Keating each subsequently testified to such advice of counsel in their  
 7 depositions.

8 **A. Keating Informed Glidewell That It Relied Upon the Advice of**  
 9 **Counsel Early In Discovery**

10 Early in discovery, in March 2012, Glidewell served Keating with a set of  
 11 interrogatories seeking, among other things, information on Keating's selection  
 12 of the KDZ Bruxer name. In April 2012, Keating provided substantive  
 13 responses to the interrogatories, including putting Glidewell on notice that  
 14 Keating consulted with counsel as part of its selecting and adopting of the name  
 15 KDZ Bruxer. Specifically, Glidewell's Interrogatory No. 16 sought the  
 16 identities of the persons most knowledgeable about Keating's selection and  
 17 adoption of KDZ Bruxer. Keating responded with "Shaun Keating, in  
 18 consultation with Defendant's attorney Thomas Gourde." (Docket 90-30 at 11.)

19 Similarly, Glidewell's Interrogatory No. 19 requested information on  
 20 investigations conducted relating to Keating's adoption of the KDZ Bruxer  
 21 name for its all-zirconia crown. Keating responded with "opinion of other  
 22 attorneys, including other trademark attorneys." (Docket 90-30 at 12.)

23 At the time Glidewell received these interrogatory responses, Glidewell  
 24 had six months of time available to take further discovery on this issue. The  
 25 only discovery it chose to pursue was a limited set of questions posed to Shaun  
 26 Keating and his General Manager, Bob Brandon.

27 ///

28 ///

**B. The Deposition Testimony of Bob Brandon and Shaun Keating**  
**Further Disclosed that Keating Relied on Advice of Counsel**

Glidewell argues that there is nothing in the record to substantiate that Keating received the go-ahead or “green light” from its counsel to use the KDZ Bruxer mark. Glidewell argues further that there is nothing in the record to suggest Keating relied on the advice of counsel and that such evidence should therefore be excluded under Rule 37(c). That is flat wrong. The deposition testimony of Keating’s General Manager, Bob Brandon, and Keating’s President and CEO, Shaun Keating, each clearly show that Keating did rely on the advice of counsel. In fact, Glidewell admits as much, noting in its Motion *In Limine* No. 6:

Keating’s General Manager, Robert Brandon, was asked at deposition “whether or not any kind of search was done to determine whether or not [the KDZ Bruxer] mark was available to use.” (Dkt. #189, Ex. 53 (Brandon Depo., at 93:4-6)) *Mr. Brandon acknowledged that “our attorney did that” and that Brandon saw “results from that search” “at one point in time.”* (Dkt. #189, Ex. 53 (Brandon Depo., at 93:7-11)) At his deposition two days later, Shaun Keating was asked: “What about selecting ‘Bruxer,’ how did you choose that one?” (Dkt. #189, Ex. 54 (Keating Depo., at 43:15-16)) *Mr. Keating responded: “We kind of sent it out, let lawyers look at it to see what they came up with, if the name could be used and this and that. And with the information I got, felt good with it, and I went ahead and proceeded with using that.”* (Dkt. #189, Ex. 54 (Keating Depo., at 44:4-8))

(Glidewell MIL No. 6 at 4:2-12 (emphasis added).) Glidewell goes on to state that Keating, during his deposition, did not disclose what specific “information” the “lawyers” told him about as to whether “the name could be used.” (*Id.* at 4:13-14). At a deposition, it is the responsibility of the questioning counsel to ask and probe with questions, not the responsibility of the deposition witness to volunteer information. Clearly, during the depositions (depositions being a well-established and integral part of the discovery process) both Keating and

1 Brandon disclosed that Keating relied on the advice of Keating's IP counsel and  
 2 moved forward with the use of the "bruxer" mark only after performing and  
 3 completing such legal due diligence.

4 Glidewell is splitting hairs by arguing that Keating and Brandon did not  
 5 specifically state, word-for-word, the advice of counsel they received. A plain  
 6 reading of the above quoted deposition testimony establishes that Shaun Keating  
 7 said that the company submitted the inquiry to its IP attorney, the IP attorney  
 8 performed the required search, and based on the IP attorney's advice, Keating  
 9 then moved forward with the use of the KDZ Bruxer mark. No follow-up  
 10 questions were asked, and that is because the record was, and remains quite  
 11 clear on this point: Keating solicited and received the advice of its IP counsel to  
 12 make sure it could lawfully use the "bruxer" term in marketing its all-zirconia  
 13 crowns for the treatment of bruxers.

14 **C. Keating's Argument That Keating's Attorney Is Not Listed On**  
 15 **Keating's Witness List is Irrelevant Because Both Keating and**  
 16 **Brandon are Listed on the Witness List**

17 Glidewell also points to the fact that Keating's trademark counsel  
 18 (Thomas Gourde) is not listed on Keating's witness list as further support for  
 19 the exclusion of the advice of counsel defense. However, Glidewell ignores that  
 20 Shaun Keating and Bob Brandon are on the witness list. As confirmed by their  
 21 depositions, Shaun Keating and Bob Brandon have personal knowledge of, and  
 22 can speak to, the advice of counsel and Keating's reliance thereon.

23 For the foregoing reasons, Glidewell's Motion *In Limine* No. 6 should be  
 24 denied.

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27 ///

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1       **III. GLIDEWELL’S MOTION *IN LIMINE* NO. 7 SHOULD BE DENIED**  
 2               **BECAUSE GLIDEWELL’S SIZE AND RESOURCES ARE**  
 3               **RELEVANT TO THE CLAIMS AND DEFENSES IN THE CASE**

4               Glidewell seeks to exclude evidence that Glidewell believes is “likely to  
 5       excite sympathy for Keating based on the parties’ relative size and financial  
 6       resources.” (Glidewell MIL No. 7 at 1.) Citing out-of-circuit unreported  
 7       decisions, Glidewell argues that references to a company’s finance and size are  
 8       irrelevant. (*Id.* at 3.) To the contrary, in this case Glidewell’s size and resources  
 9       are relevant to an analysis of the Ninth Circuit’s *Sleekcraft* factors and to  
 10      Keating’s affirmative defenses or counterclaims.

11              First, when considering the Ninth Circuit’s *Sleekcraft* factors, Glidewell  
 12      chose in this case not to produce survey evidence of confusion between  
 13      Glidewell’s mark and Keating’s mark. It likewise chose not to produce survey  
 14      evidence of the strength of the BruxZir mark in the minds of the relevant  
 15      consumer population (dentists around the country). For a company like  
 16      Glidewell with enormous resources, the absence of survey evidence may be  
 17      used to infer that the results of such a survey would be unfavorable. *See*  
 18      *Playboy Enters. v. Netscape Communs. Corp.*, 55 F. Supp. 2d 1070, 1084 (C.D.  
 19      Cal. 1999); *Cairns v. Franklin Mint Co.*, 24 F. Supp. 2d 1013, 1041–42 (C.D.  
 20      Cal. 1998) (“[A] plaintiff’s failure to conduct a consumer survey, assuming it  
 21      has the financial resources to do so, may lead to an inference that the results of  
 22      such a survey would be unfavorable.”)

23              Second, the relative size and resources of Glidewell are directly relevant  
 24      to Keating’s Fourth Affirmative Defense of Misuse of Trademark, Unclean  
 25      Hands, and Unfair Competition, and Third Counterclaim for Misuse of  
 26      Trademark. The Court is presented with facts for which a trademark misuse  
 27      claim is proper. Glidewell has been attempting to destroy competition for all-  
 28      zirconia crowns by relying on its trademark registration to prevent competitors

1 from using generic and descriptive terms, such as “brux” and “bruxer” to  
 2 identify and describe such products. Significantly, Glidewell sent cease-and-  
 3 desist letters to numerous dental labs to prevent them from using the terms  
 4 “brux” and “bruxer” in their name. (Docket No. 91-24 – 91-32.) In each  
 5 instance, the dental lab chose to change its name rather than face the risk of a  
 6 lawsuit in federal court initiated by Glidewell. (*Id.* at 91-6.)

7 In the case of Keating, Glidewell has attempted to require it to buy  
 8 Glidewell products in order to avoid this lawsuit. (Docket No. 91-19.) When  
 9 encountering competitor dental labs using “Bruxer” in the name of their all-  
 10 zirconia crowns, Glidewell has tried to get the competitor to purchase zirconia  
 11 from Glidewell. (Docket No. 91-19,24-34.) In one such instance, Glidewell  
 12 falsely informed the competitor that it had filed a lawsuit against that  
 13 competitor. (Docket No. 9-6 (Allred Dep. Tr.) at 221:5-222:16; Docket No. 9-  
 14 24.) As the largest dental lab in the United States, Glidewell’s volume of sales  
 15 of all-zirconia crowns far exceeds that of other labs. (*Compare* Docket No. 96,  
 16 ¶ 5 *with* Docket No. 91-4 (DiTolla Dep. Tr.) at 233:10-15.) Glidewell knows  
 17 that other dental laboratories lack the resources to bear the litigation costs  
 18 associated with contesting a trademark infringement claim in federal court.  
 19 Glidewell has used this awareness to stop other labs from using marks  
 20 containing terms such as “Bruxer” and “Brux” to refer to their all-zirconia  
 21 crowns for bruxers, thereby hampering their ability to compete with Glidewell  
 22 in the market share for all-zirconia crowns. All of this background helps  
 23 explain why competitors are not using the generic and descriptive “bruxer” term  
 24 to describe such commonly manufactured zirconia dental crowns.

25 Glidewell has widely promoted its all-zirconia crowns as “ideal for  
 26 bruxers,” and the record is clear that Glidewell’s intent when launching the  
 27 product was to provide a crown “indicated for bruxers.” (Docket No. 91-18, 91-  
 28 4 at 75:7-16, 85:15-87:5; Docket No. 92, Ex. 50 at 15:8-15.) As the Supreme

1 Court has explained, the Lanham Act was not meant “to deprive commercial  
2 speakers of the ordinary utility of descriptive words.” *KP Permanent Make-Up,*  
3 *Inc. v. Lasting Impression I, Inc.*, 543 U.S. 111, 122, 125 S. Ct. 542, 550 (2004).  
4 The Court also discussed “the undesirability of allowing anyone to obtain a  
5 complete monopoly on use of a descriptive term simply by grabbing it first.” *Id.*  
6 That is exactly what Glidewell is trying to do with its “bruxzir” mark.

7 In explaining its efforts to prevent others from using the descriptive terms  
8 “brux” and “bruxer,” Glidewell argued it has the right to do so because it was  
9 the first to offer a crown indicated for bruxers and to indicate that term in the  
10 name of their product. (Docket No. 92, Ex. 50 at 41:1-42:3; 86:8-87:7; 176:19-  
11 178:22.) This admission illustrates that Glidewell is attempting to use its  
12 trademark registration to gain something akin to patent rights, seeking to  
13 prevent competitors from selling all-zirconia crowns for use with bruxers or in  
14 brux cases. This is counter to the trademark law policy of promoting  
15 competition.

16 If Glidewell can become the only provider of all-zirconia crowns that is  
17 able to use “brux” or “bruxer” in the name to describe to dentists that its product  
18 is a crown indicated for bruxers, dentists will only find Glidewell when  
19 searching for such a crown. This is Glidewell’s strategy: to destroy competition  
20 and increase its market share through misuse of its improperly issued trademark  
21 registration. Evidence of Glidewell’s relative size to its competitors is crucial to  
22 demonstrating Glidewell has the ability to carry out this strategy.

23 Furthermore, the size and resources of Glidewell are relevant to the issue  
24 of witness bias in this case. Because of Glidewell’s relative size and resources,  
25 witnesses in the dental industry might be inclined to alter their testimony to  
26 ingratiate themselves to the market leader. Thus, the trier of fact should be  
27 aware of Glidewell’s size and resources in order to more accurately evaluate the  
28 testimony of witnesses in the dental industry.



1 For the foregoing reasons, Glidewell's Motion *In Limine* No. 7 should be  
2 denied.

3 **IV. GLIDEWELL'S MOTION *IN LIMINE* NO. 8 IS UNOPPOSED,**  
4 **AS ALREADY COMMUNICATED TO GLIDEWELL'S COUNSEL**  
5 **DURING THE LOCAL RULE 7-3 CONFERENCE OF COUNSEL**

6 Glidewell's Motion *In Limine* No. 8 is unnecessary. Glidewell asserts  
7 that "[t]he parties' counsel discussed the issues presented by this Motion, but  
8 could not reach agreement." (Glidewell MIL No. 8 at i:21-27.) This is  
9 incorrect. Counsel for Keating told counsel for Glidewell during the meet-and-  
10 confer that they agreed with Glidewell about this evidentiary concern and that a  
11 motion *in limine* on this issue would be unnecessary.

12 Glidewell now asks that the Court exclude evidence of the Court's prior  
13 statements, order, and rulings on: (a) Keating's Motion for Summary Judgment;  
14 (b) Keating's Motion for Reconsideration; (c) Keating's Motion for Leave to  
15 File Second Amended Answer; and (d) the parties' cross-motions for summary  
16 judgment, heard by the Court on December 21, 2012, including the Court's  
17 verbally-delivered tentative ruling as to some of those motions. (*Id.* at 5:12-19.)  
18 A cursory glance at the parties' Joint Exhibit List clearly demonstrates that  
19 Keating has no intention of introducing said evidence—this evidence is not on  
20 the list. (*See* Docket No. 195.) Keating fails to understand why Glidewell  
21 would waste the valuable time of this Court, as well as the resources and  
22 finances of both Keating and Glidewell, to prepare and file an unnecessary  
23 motion *in limine*.

24 **V. GLIDEWELL'S MOTION *IN LIMINE* NO. 9 IS UNOPPOSED,**  
25 **AS COMMUNICATED TO GLIDEWELL'S COUNSEL DURING**  
26 **THE LOCAL RULE 7-3 CONFERENCE OF COUNSEL**

27 Glidewell's Motion *In Limine* No. 9 is also unnecessary. Glidewell  
28 asserts that "[t]he parties' counsel discussed the issues presented by this Motion,



1 but could not reach agreement.” (Glidewell MIL No. 9 at i:15-17.) Again, this  
 2 is incorrect. Counsel for Keating told counsel for Glidewell during the meet-  
 3 and-confer that it was unnecessary to bring this motion *in limine*. No one  
 4 disputes that evidence relating to settlement communications is inadmissible at  
 5 trial under F.R.E. 408.

6 Glidewell now seeks an order from the Court to exclude: (a) the  
 7 November 17, 2011 email from Keating’s counsel to Glidewell’s counsel; (b)  
 8 the February 2, 2012 Settlement Conference Order; (c) the February 7 2012  
 9 letter from Glidewell’s counsel to Keating’s counsel; (d) the February 13 2012  
 10 letter from Keating’s counsel to Glidewell’s counsel; (e) the February 15, 2012  
 11 communication from Glidewell’s counsel to Keating’s counsel; (f) Glidewell’s  
 12 March 30, 2012 Confidential Settlement Statement; and (g) the December 27,  
 13 2012 letter from Glidewell’s counsel. (Glidewell MIL No. 9 5:2-10.) A review  
 14 of the parties’ Joint Exhibit List plainly demonstrates Keating has no intention  
 15 of introducing said evidence—these items are not on the list. (*See* Docket No.  
 16 195.) Glidewell should not be wasting the valuable time of this Court, as well  
 17 as the resources and finances of both Keating and Glidewell, to prepare and file  
 18 an unnecessary motion *in limine*.

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**VI. CONCLUSION**

For the foregoing reasons, Keating respectfully requests that the Court deny Glidewell's Motion *In Limine* Nos. 5-9.

Respectfully submitted,

KNOBBE, MARTENS, OLSON & BEAR, LLP

Dated: January 18, 2013

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